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No. 09-1425

Supreme Court, U.S.
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In the Supreme Court of the United States

NEW YORK, PETITIONER

v.

DARRELL WILLIAMS, EFRAIN HERNANDEZ,
CRAIG LEWIS, & EDWIN RODRIGUEZ, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
&
BRIEF IN OPPOSITION

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July 29, 2010

QUESTION PRESENTED

In *United States v. DiFrancesco*, 449 U.S. 117 (1980), this Court held that the multiple punishments protection of the Double Jeopardy Clause was not violated when an increased sentence was imposed upon a defendant following a government appeal, because the statutory appeal provisions prevented defendant from accruing an expectation of finality in the original sentence. The question presented here is:

Whether, given the unique sentence-correction landscape of New York law as it existed at the time defendants were subjected to increased sentences — which allowed the State one year within which to challenge a sentence as unlawful, but also granted courts a temporally undefined period within which to correct a sentence — the defendants, whose sentences had not been challenged by the State within the statutory time, and who had fully served sentences ranging from 3 to 7 years, had accrued legitimate expectations of finality in those sentences protected by the Double Jeopardy Clause's guarantee against multiple punishments.

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No. 09-1425

In the Supreme Court of the United States

NEW YORK, PETITIONER

-against-

DARRELL WILLIAMS, EFRAIN HERNANDEZ, CRAIG LEWIS, AND EDWIN RODRIGUEZ, RESPONDENTS.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondents Darrell Williams, Efrain Hernandez, Craig Lewis, & Edwin Rodriguez, ask leave to file the attached Brief in Opposition *in forma pauperis*. Each respondent was granted leave to so proceed in the Supreme Court of the State of New York, Appellate Division, First Department, and was assigned counsel in the New York State of Appeals. Respondents' affidavits in support of this motion follow this application.

Dated: July 29, 2010

ROBERT S. DEAN
Counsel of Record
MARK W. ZENO
BARBARA ZOLOT
CARL S. KAPLAN
Counsel for Respondents

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74 Trinity Place - 11th floor
New York, NY 10006
(212) 577-2523

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Darrell Williams, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	MONTH 1,2,&3 2009 ONLY $160.00	$ NONE	$ INCARCERATED	$ NONE
Self-employment	$0	$	$	$
Income from real property (such as rental income)	$0	$	$	$
Interest and dividends	$0	$	$	$
Gifts	$0	$	$	$
Alimony	$0	$	$	$
Child Support	$0	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$0	$	$	$
Disability (such as social security, insurance payments)	$0	$	$	$
Unemployment payments	$0	$	$	$
Public assistance (such as welfare)	$0	$	$	$
Other (specify):	$0	$	$	$
Total monthly income:	$160.00	$ NONE	$ INCARCERATD	$ NONE

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
CEO	32 BROADWAY NEW YORK, N.Y	JAN 2009 TO MARCH 2009	$ 160.00 $ $

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$ NONE $ $

4. How much cash do you and your spouse have? $ NONE
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
NONE	NONE	$ $ $	$ NO SPOUSE $ $

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☑ Home
Value NONE

☑ Other real estate
Value NONE

☑ Motor Vehicle #1
Year, make & model
Value NONE

☑ Motor Vehicle #2
Year, make & model
Value NONE

☑ Other assets
Description
Value NONE

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NO ONE	$	$ NO SPOUSE
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NO ONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$ 0
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ INCARCERATED	$ 0
Clothing	$	$ 0
Laundry and dry-cleaning	$	$ 0
Medical and dental expenses	$	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ INCARCERATED	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other:	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other:	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify):	$ 0	$ 0
Total monthly expenses: INCARCERATED	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much?

If yes, state the attorney's name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much?

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

BE ADVISE THAT DARRELL WILLIAMS IS INCARCERATED AND WILL BE FOR A while.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JUNE 6, ,20 10

Darrell Williams (Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Efrain Hernandez, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 1,200	$	$ not sure	$
Self-employment	$ ~~1,680~~ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 480	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 1680	$	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Bond Staffing	161 Bway	1-21-10	$ 1000
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Neighborhood Trust	Savings	$ 700	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

[ ] Home
Value N/A

[ ] Other real estate
Value

[ ] Motor Vehicle #1
Year, make & model
Value

[ ] Motor Vehicle #2
Year, make & model
Value

[ ] Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
None	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ 242 monthly	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 160 monthly	$ same
Home maintenance (repairs and upkeep)	$	$
Food	$ 200 monthly	$
Clothing	$ 150 monthly	$
Laundry and dry cleaning	$ 50 monthly	$
Medical and dental expenses	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 108 monthly	$
Recreation, entertainment, newspapers, magazines, etc.	$ 40 monthly	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's share Apt.	$ 242 Rent monthly	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

working for an agency and my Job is almost over, I dont know how long its going to take me to find another Job.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much?

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much?

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Working temporary and cant Afford to pay for legal help and keep up with my b.ll.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6/3- , 2010

(Signature)

Ofaun Hernandez

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, CRAIG LEWIS, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A
Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 0	$ N/A	$ 0	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child Support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ N/A	$ 0	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public assistance (such as welfare)	$ 200	$ N/A	$ 230	$ N/A
Other (specify): FOOD STAMPS / TRANSITIONAL HOUSING	$ 200/215	$ N/A	$ 200/215	$ N/A
Total monthly income:	$ 615	$ N/A	$ 645	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ $ $

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ $ $

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
N/A		$ $ $	$ $ $

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☑ No Is property insurance included? ☐ Yes ☑ No	$ 21	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 200	$ N/A
Clothing	$ 50	$ N/A
Laundry and dry cleaning	$ 20	$ N/A
Medical and dental expenses	$ —	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 100	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ –	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ –	$ N/A
Life	$ –	$ N/A
Health	$ –	$ N/A
Motor Vehicle	$ –	$ N/A
Other:	$ –	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ –	$ N/A
Installment payments		
Motor Vehicle	$ –	$ N/A
Credit card(s)	$ –	$ N/A
Department store(s)	$ –	$ N/A
Other:	$ –	$ N/A
Alimony, maintenance, and support paid to others	$ –	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ –	$ N/A
Other (specify):	$ –	$ N/A
Total monthly expenses:	$ 585	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much?

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much?

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 20 , 20 10

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Edwin Rodriguez, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 674.00	$ 0	$ 674.00	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public assistance (such as welfare)	$ 40.00	$ 0	$ 40.00	$ 0
Other (specify):	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 714.00	$ 0	$ 714.00	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$ $ $

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$ $ $

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE		$ $ $	$ $ $

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model NONE
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
NONE	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 40.00	$ 0
Clothing	$ 150.00	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 300	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other:	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other:	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify):	$ 0	$ 0
Total monthly expenses:	$ ~~1220.00~~ 1220.00	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

I am going to pay RENT soon

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much?

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much?

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

NOThing

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 7/28/2010, 20

Edwin Rodriguez
(Signature)

In the Supreme Court of the United States

NEW YORK, PETITIONER

-against-

DARRELL WILLIAMS, EFRAIN HERNANDEZ,
CRAIG LEWIS, AND EDWIN RODRIGUEZ, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the New York State Court of Appeals (Pet. App. 1a) is reported at 14 N.Y.3d 198, 925 N.E.2d 878, 899 N.Y.S.2d 76. The decisions of the Supreme Court of the State of New York, Appellate Division, First Department (Pet. App. 45a through 54a) are reported at 59 A.D.3d 172, 871 N.Y.S.2d 908 (Williams), 59 A.D.3d 180, 872 N.Y.S.2d 455 (Hernandez), 60 A.D.3d 425, 873 N.Y.S.2d 489 (Lewis), and 60 A.D.3d 452, 874 N.Y.S.2d 117 (Rodriguez).

JURISDICTION

The judgment of the New York State Court of Appeals was entered on February 23, 2010. The petition for a writ of certiorari was filed on May 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT

Each respondent was originally sentenced to a determinate prison term after being convicted of a violent felony offense.[1] *People v. Williams*, 14 N.Y.3d 198, 209-11 (2010). In each instance, the sentencing court did not impose a period of post-release supervision ("PRS") — a supervisory period that can, if violated, result in additional incarceration , and that New York law mandates must be imposed on every defendant who stands convicted of a violent felony offense. *Id.* New York law allows the State one year within which to challenge a sentence as unlawful, but the State never exercised its right to challenge the legality of any of respondents' sentences here. *Id.* at 213, & 209-11. After serving years in prison, and years after the expiration of the State's right to challenge the legality of the sentences, each respondent was released from custody. *Id.* at 209-11.

Though post-release supervision had not been judicially imposed, New York State's Department of Corrections ("DOCS") administratively added a period of PRS to each respondent's sentence, a step it took for each defendant and others similarly situated. *Id.* Thereafter, the New York Court of Appeals subsequently found that DOCS had no authority to impose post-release supervision. *People v. Sparber*, 10 N.Y.3d 358 (2008). The Court affirmed

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[1]Mr. Williams was sentenced to a 3-year prison term, Mr. Lewis to a 5-year term, and Messrs. Hernandez & Rodriguez to 7-year terms. *People v. Williams*, 14 N.Y.3d 198, 209-11 (2010).

that, under New York law, all sentences, including sentences of PRS, must be pronounced by the court. *Id.*[2]

Following the court's decision in *Sparber*, each respondent herein was returned to the court that had originally sentenced him pursuant to an administrative or, later, legislative,[3] mandate for the court to consider whether to resentence him by adding PRS to the originally imposed sentence. *Williams*, 14 N.Y.3d at 209-11.[4] By that time, each respondent had completed the determinate sentence originally imposed. *Id.* Over objections based, *inter alia*, on state law, double jeopardy, and due process, the court resentenced each respondent, adding a period of PRS to the prison sentence that had been originally imposed and fully served.

Appeals to the intermediate state appellate court and the New York Court of Appeals followed. The intermediate court rejected respondents'

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[2]The United States Court of Appeals for the Second Circuit had previously held, in *Earley v. Murray*, 451 F.3d 71, 76-77 (2006), *cert. denied sub nom. Burhlre v. Earley*, 551 U.S. 1159 (2007) that, as a matter of clearly established federal law as determined by this Court, a sentence of post-release supervision imposed by DOCS upon a New York defendant was constitutionally a nullity, as the "imposition of sentence is a judicial act."

[3]While respondent Williams was returned to court for resentencing pursuant to a notification from DOCS (14 N.Y.3d at 209), respondents Hernandez, Lewis, and Rodriguez, were returned to court for resentencing pursuant to McKinney's New York Correction Law §601-d, enacted by the Legislature following the *Sparber* decision. 14 N.Y.3d at 210-11; *see also* 14 N.Y.3d at 208, for a description of §601-d.

[4]A 3-year period of post-release supervision was added to respondent Williams's sentence (Pet. App. 58a), and 5-year periods to respondent Hernandez's (Pet. App. 73a), Lewis's (Pet. App. 75a), and Rodriguez's sentences. Pet. App. 83a.

double jeopardy claims and affirmed the resentencing orders. 59 A.D.3d 172, 871 N.Y.S.2d 908 (Williams), 59 A.D.3d 180, 872 N.Y.S.2d 455 (Hernandez), 60 A.D.3d 425, 873 N.Y.S.2d 489 (Lewis), and 60 A.D.3d 452, 874 N.Y.S.2d 117 (Rodriguez).

But the New York Court of Appeals reversed.[5] Relying on this Court's decision in *United States v. DiFrancesco*, 449 U.S. 117 (1980), and a number of federal (14 N.Y.3d at 215-16) and state court decisions (*id.* at 216 n.2), a five-judge majority held that because the State's authority to challenge the legality of the sentences had lapsed years earlier, and each respondent had served the sentence actually imposed and been released, they had developed legitimate expectations that the originally imposed sentences were final and would not later be increased. 14 N.Y.3d at 217. "Even where a defendant's sentence is illegal, there is a legitimate expectation of finality once the initial sentence has been served and the direct appeal has been completed (or the time to appeal has expired)." *Id.* At that point, "the Double Jeopardy Clause prevents reformation to attach a PRS component to the original completed

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[5]By the time that appeal was heard, respondent Williams had not only fully completed the originally imposed prison term, but had also completed the PRS term imposed at the resentencing, rendering moot petitioner's application with respect to respondent Williams. While petitioner claims the issue is not moot with respect to respondent Williams (Pet. at pp. 11-12, n.7), petitioner has failed to identify a single issue specific to Williams that would not be resolved if a decision in each of the other defendants' cases were reached. Therefore, even if this Court grants certiorari as to respondents Hernandez, Lewis, and Rodriguez, it should not grant as to respondent Williams.

sentence." *Id.* The Court of Appeals vacated each resentence and reinstated the original sentences. *Id.* at 222.

The Court of Appeals, however, rejected respondents' argument that state law further limited the court's inherent authority to correct illegal sentences. *Id.* at 212-13. Respondents had argued that because statutory law conferred upon the State one year within which to move in the trial court to correct an unlawful sentence and granted no statutory authority to the courts for judicial correction at all, the year deadline must also bind courts in their exercise of inherent authority. *Id.* at 212. The Court of Appeals held that, in New York, the courts' inherent power to correct illegal sentences extends beyond the one-year period for the State to seek resentencing in the court of original jurisdiction. *Id.* The court also found that, as a matter of state law, the resentencings had not been unreasonably delayed because defendants were resentenced with a reasonable time after DOCS notified the courts that the sentences were illegal. *Id.* at 213.

Two judges dissented, finding no double jeopardy violation in the courts' addition of PRS. According to Judge Smith, *DiFrancesco* did not impart to defendants any legitimate expectation of finality in their sentences, but instead settled that double jeopardy had a "very limited effect" on the power of courts to increase sentences. *Id.* at 223. Judge Smith believed that due process was the appropriate mode of analysis, and that the correction here

did not violate respondents' due process rights. *Id.* at 222-225. Judge Pigott, relying on *Bozza v. United States*, 330 U.S. 160 (1947), stated that no legitimate expectation of expectation of finality can arise in an illegal sentence, because a defendant is charged with knowing that his sentence, if illegal, will be subject to correction. *Williams*, 14 N.Y.3d at 225-229.

Petitioner now seeks certiorari[6] on the issue, as they frame it, of whether double jeopardy bars correction of an illegal sentence ("Does the Double Jeopardy Clause prohibit a court from correcting a sentence that, as originally pronounced, lacked a required component or was otherwise illegally lenient." Pet., Question Presented). As explained further below, petitioner fails to present any compelling reason for this Court to grant its writ of certiorari. *See* Supreme Court Rule 10 ("review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."). There is no dispute, nor did the Court of Appeals deny, that courts may correct illegal sentences without effecting a double jeopardy violation. The Court of Appeals sanctioned the generous period of time allotted under New York law to the State and the

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[6]Petitioner's application for a stay pending certiorari (docket no. 09A839) was denied by Justice Ginsburg on March 24, 2010, refiled and submitted to Justice Alito on March 26, 2010, referred to the Court on March 31, 2010, and denied by the Court on April 19, 2010.

courts for correcting such sentences in the trial court, rebuffing respondents' efforts to limit both actors to one year.

The question addressed by the New York Court of Appeals concerned the limits Federal double jeopardy placed upon the inherent sentence-correction powers granted to courts by state common law. The Court of Appeals unremarkably held that a sentence may not be increased after the State's right to challenge its legality had lapsed, and after the sentence had been completed. As to that, petitioner makes no claim, nor can it, that this presents a compelling reason for this Court's review, for the Court of Appeals' holding is consistent with every appellate court to have addressed the issue. Save the intermediate court's ruling below, no state or federal case has ever held that a sentence — illegal or otherwise — can be increased after its completion and after the time to appeal has expired. Petitioner cites no such authority, and respondents have found none. There is no conflict for this Court to resolve, and the Court of Appeals' holding, far from departing from existing law, has at last brought New York in line with federal law and the laws of other states.

Nor does the New York Court of Appeals' holding conflict with precedent from this Court. The Court of Appeals correctly read *United States v. DiFrancesco*, 449 U.S. 117, and its holding finds no conflict with *Bozza v. United States*, 330 U.S. 160 (1947), or *Monge v. California*, 524 U.S. 721

(1998). But even beyond the correctness of *Williams* and the absence of any conflict in the law, certiorari is not appropriate because a holding from this Court declaring that illegal sentences do not ever become final would be academic. To be sure, respondents would be restored to post-release supervision, again, and other New York defendants might be, too. But the rule advocated by petitioner would have no appreciable impact on state and federal law beyond New York. For this additional reason, the case does not compel review.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT THIS COURT NEEDS TO RESOLVE REGARDING WHETHER DOUBLE JEOPARDY PERMITS JUDICIAL CORRECTION OF ILLEGAL SENTENCES, OR WHETHER A TEMPORAL LIMIT APPLIES TO SUCH CORRECTIONS.

Petitioner poses a false dichotomy in an effort to create a conflict where none exists. Petitioner asserts that "[c]ourts nationwide are divided over whether the Double Jeopardy Clause limits a court's authority to correct a sentence that lacks a required provision or is otherwise illegal." (Pet. at 12). They represent this purported divide by framing "Majority" and "Minority" views. The "Majority view," they state, holds that double jeopardy "does not bar correction of an illegally-lenient sentence," while the "Minority view" holds that double jeopardy "imposes a bright-line temporal limit on the court's power to correct an illegally-lenient sentence." (Pet. at 13).

Whether the constitutional protection against double jeopardy prohibits the correction of a sentence does not hinge on its legality, but, as this Court ruled in *United States v. DiFrancesco* in considering the Government's appeal of a sentence they urged was unlawfully lenient, upon whether the defendant has developed a legitimate expectation of finality in it. 449 U.S. 117, 136-37, 139 (1980); *see, People v. Williams*, 14 N.Y.3d 198, 215 ("the Court held that the protection against multiple punishments prevents a sentence from being increased once the defendant has a legitimate expectation in the finality of the sentence"). While the legality or illegality of a sentence affects when a defendant accrues a legitimate expectation of finality, it establishes no litmus test as to whether the sentence remains forever subject to correction.

Consistent with *DiFrancesco*, the timing of when a defendant accrues a constitutionally protected legitimate expectation of finality is a function of the laws each jurisdiction has in place for the appeal and correction of sentences.[7]

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[7]The United States Code and the Federal Rules of Criminal Procedure preempt *DiFrancesco's* constitutional analysis for Federal sentencings, by placing narrow and strict time-limitations on appeals and sentence corrections. The government may only challenge a sentence on appeal, even one resulting from plain error, if it files a notice of appeal within 30 days of entry of judgment or the filing of a notice of appeal by defendant. *See* Fed.R.App.P. 4(b)(1); USC § 3742(b); *see, Greenlaw v. United States*, 554 U.S. _, _, 128 S.Ct. 2559, 2566 (2008)("Congress ... has accorded to the top representatives of the United States in litigation the prerogative to seek or forego appellate correction of sentencing errors, however plain they may be"). Rule 35(a), entitled "Correcting Clear Error," allows a court 14 days to "correct a sentence that resulted from arithmetical, technical, or other clear error."

Petitioner's reference to FRCP Rule 36, at pp. 14-15, fn. 9 of its petition, as giving "federal courts authority to correct sentences where a mandatory or

In *DiFrancesco*, for example, this Court held that the appeal provisions set forth in 18 USC §3576 determined the period during which a defendant could not expect his sentence to be final. 449 U.S. at 136. That the appeal needed to be taken promptly and involved a finite period militated against it working a double jeopardy violation. *Id.* This Court likened the lack of finality attaching to a sentence subject to appeal to a sentence of probation or parole. As the Court explained, a defendant's expectations of finality in such a sentence are not upset if the parole or probation is later revoked during the course of its service. *Id.* at 137.

In New York, statutory provisions control the State's ability to challenge legal and illegal sentences. A legal sentence may not be changed once a defendant has begun to serve it. McKinney's NY Criminal Procedure Law §430.10 ("when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed,

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negotiated provision has been inadvertently omitted," is simply wrong. The failure to impose a period of supervised release is not a clerical error covered by Rule 36, but falls within Rule 35's time limits. *U.S. v. Robinson*, 368 F.3d 653 (6th Cir. 2004)(holding that failure to impose supervised release is not a clerical error, because"a clerical error must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature"); *see also United States v. Werber*, 51 F.3d 342, 343 (2d Cir.1995) ("Rule 36 authorizes a court to correct only clerical errors in the transcription of judgments, not to effectuate its unexpressed intentions at the time of sentencing").

suspended or interrupted once the term or period of the sentence has commenced"). The State may not challenge a sentence unless it is "invalid as a matter of law." McKinney's NY Criminal Procedure Law 440.40(1), 450.30(2). Courts also possess the non-statutory inherent power to correct sentences. *Williams*, 14 N.Y.3d at 212-13. In New York, then, a legally sentenced defendant's legitimate expectation of finality accrues immediately, upon commencement of service, but an illegally sentenced defendant's finality expectations are deferred: he knows his sentence is subject to correction via statutory rule or common-law inherent power.

Addressing respondents' claims in the context of New York's unique sentence-correction framework, the New York Court of Appeals concluded that illegally sentenced New York defendants do not accrue a legitimate expectation of finality until both (a) the State's statutory right to challenge the sentence's legality expires, and (b) the sentence has been fully served. *Id.* at 217 ("[e]ven where a defendant's sentence is illegal, there is a legitimate expectation of finality once the initial sentence has been served and the direct appeal has been completed (or the time to appeal has expired). In these situations, the sentences are beyond the court's authority and an additional term of PRS may not be imposed").

In so holding, New York joined neither a majority or minority, but became one more court adhering to a universally accepted application of

DiFrancesco. No case holds that a sentence may be corrected after its completion, and after the statutory time to challenge it has expired. Except for petitioner's position in the instant case, there is no conflict or dispute on that point.

Although framed as a conflict, the Majority and Minority views are not in tension; they present easily reconcilable applications of *DiFrancesco*. Respondents have never disputed the general correctness of the so-called Majority-view principle that double jeopardy poses no bar to the correction of illegally lenient sentences. The so-called Minority view is not at odds with that: an illegally lenient sentence may be corrected during the period allowed for appeal, but not after the expiration of that period and the completion of the sentence itself. The two concepts are complementary, not mutually exclusive.

Every case petitioner cites in support of its Majority view reflects those limits on a court's sentencing correction powers. Every case cited by petitioner involves a sentence correction effected either on the defendant's

appeal[8]; within the State's period for challenge or appeal[9]; or while the defendant was still serving the sentence.[10]

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[8]*See United States v. Hawthorne*, 806 F.2d 493,499-501 (3rd Cir. 1986)(on remand following defendant's appeal, sentencing court could increase amount of restitution on remaining counts); *State v. Williams*, 800 So.2d 790, 793-94 (La. 2001)(on defendant's appeal, reviewing court recognized illegal sentence *sua sponte* and remanded for resentencing); *State v. Wilcox*, 479 N.W.2d 134, 136-37 (Neb. 1992)(illegally low sentence vacated on defendant's direct appeal of conviction); *Stafford v. State*, 800 P.2d 738, 739 (Okla. Crim. App. 1990)(harsher sentences imposed after defendant's post-conviction motion resulted in vacatur of illegal sentences); *State v. Babbel*, 813 P.2d 86, 88 (Utah 1991)(vacatur of illegal sentences and imposition of harsher sentences following defendant's appeal).

[9]*See United States v. Strozier*, 940 F.2d 985,997 (6th Cir. 1991)(amended judgment adding supervised release entered within ten-day time limit for appeals set forth in the Federal Rules); *United States v. Fogel*, 829 F.2d 77, 88, 89, n.11 (D.C.Cir. 1987)(opining that the government's right to appeal is "crucial to the double jeopardy analysis," and that "in the absence of such a factor, the defendant has an interest in the finality of his original sentence;" noting further that an illegal sentence is subject to correction within the period prescribed by the Federal Rules); *City of Chicago v. Roman*, 705 N.E.2d 81,85-86 (Ill. 1998)(matter remanded for resentencing on city's appeal of prior reduction); *State v. Wika*, 574 N.W.2d 831, 832 (N.D. 1998)(State moved to correct the illegal sentence under state rule); *Cline v. State*, 571 So.2d 368, 369 (Ala. Crim. App. 1990)(increase to sentence effected pursuant to the State's motion where sentence imposed 3 weeks earlier failed to comply with mandatory provisions); *United States v. Rico*, 902 F.2d 1065,1068 (2nd Cir. 1990)(defendant's illegally low sentence corrected "well within the time for either party to file a notice of appeal"); *State v. Pascal*, 736 P.2d 1065, 131,139 (Wash. 1987)(challenge to presumptively low sentence made pursuant to State's statutory right of appeal).

[10]*See Caille v. United States*, 487 F.2d 614, 615 (5th Cir. 1973)(3-year sentence enhanced less than 2 months after its imposition); *United States v. Kenyon*, 519 F.2d 1229, 1231 (9th Cir. 1975)(special parole term added after defendant violated probation); *State v. Powers*, 742 P.2d 792, 793, 796 (Ariz. 1987)(fees added to 25-to-life sentences during service of sentence); *State v. Delmondo*, 696 P.2d 344, 345 (Haw. 1985)(illegal sentence corrected 5 days after imposition); *State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999)(defendant serving sentence at the time of correction); *State v. Calmes*, 632 N.W.2d 641, 644, 648 (Minn. 2001)(additional term of conditional release added while defendant was on properly imposed supervised release); *Froembling v. Gladden*, 417 P.2d 1020 ,

In sum, the cases relied upon by petitioner in support of a supposed conflict compelling review by this Court are not in conflict with *Williams* at all, for they do not hold, or even suggest, that sentences may be increased after their completion and after the State's time for appeal has expired. To the contrary, the corrections in each case were made before the sentences were completed or before the period for appeal had expired — and thus are entirely consistent with the state court's decision in *Williams*, as well as with the cases cited in the "Minority view" section of petitioner's application.

Conversely, petitioner poses cases locating a constitutional limit to the correction of illegal sentences as standing "[i]n contrast to the prevailing view." (Pet. at 18). But again, these cases are not in contrast to the prevailing view at all, because they do not reject that illegal sentences are subject to correction, but only apply an outside limit to such corrections — a matter not at issue in the "Majority View" cases, where each correction was effected

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1021(Or. 1966)(resentencing occurred during service of sentences); *Commonwealth v. Jones*, 554 A.2d 50, 51 (Pa. 1989)(illegal sentence corrected in defendant's presence one day after imposition); *People v. Hernandez*, 968 P.2d 465, 467 (Cal. 1998)(court imposed a 5-year enhancement at sentencing after initially indicating it would not); *Strickland v. State*, 687 S.E.2d 221,222 (Ga. App. 2009)(mandatory fine added during service of 10-year sentence); *People v. Brown*, 2001 WL 682439, *1 (Mich. App. 2001)(court "clarified" after sentencing that sentence was to be served consecutively to an existing sentence); *Abram v. State*, 574 S.2d 986, 988 (Ala. Crim. App. 1990) (defendant's resentence to 25 years occurred during period of service of illegal 5-year split term); *Grajczyk v. State*, 666 N.W.2d 472,473 (S.D. 2003)(defendant's suspended sentence revoked by appellate court during service of sentence).

within the period for appeal or before the sentence's completion. Petitioner has cited no case, and, as far as respondents are aware, none exists, holding that an illegal sentence may be corrected after its completion and after the time for appeal has expired. Before *Williams*, New York's lower courts stood alone in allowing such corrections. *Williams* has not "deepened" any split – there was no split to begin with. Instead, the Court of Appeals brought New York in line with every court to have addressed the issue. This Court should deny the petition for certiorari as there is neither confusion nor conflict on this issue requiring resolution by this Court.

II. *DiFrancesco* Sets Forth a Clear Analysis for Deciding the Narrow Question of the Constitutionality of Sentencing Increases and There Is No Compelling Reason to Revisit this Precedent.

Petitioner asserts, in the alternative, that, apart from *Williams'* purported split deepening role, certiorari should be granted because the decision "cannot be squared with precedents that define the scope of the double jeopardy protection," since this Court has held that "the Double Jeopardy Clause does not bar correction of an illegal sentence, even where it increases punishment." (Pet. at 21). To the contrary, as discussed below, *Williams* squarely applies *DiFrancesco*, which created a rule of law that forbids increasing a defendant's sentence once he has developed a legitimate expectation that his sentence is final. *DiFrancesco's* legitimate expectation of

finality analysis encompasses both legal and illegal sentences. *Williams* imposed no contrary "bright-line temporal limit" of widespread application, as petitioner describes it (Pet. at 18), but applied the *DiFrancesco* legitimate-expectation-of-finality analysis to the unique contours of New York's law governing sentence corrections.

Petitioner relies on *Bozza v. United States*, 330 U.S. 160 (1947), for the proposition that "the Double Jeopardy Clause does not bar correction of an illegal sentence." Pet. at 21. But as discussed further below, *Bozza* established only the then-new, and much narrower principle, that an illegal sentence was subject to change after its commencement. Nothing in it detracts from *DiFrancesco's* legitimate-expectation-of-finality rule defining the outer limits for such corrections. Finally, neither *Monge v. California*, 524 U.S. 721, 734 (1998), nor any other case from this Court "declares" that the Double Jeopardy Clause's protections do not apply to other than capital punishments (Pet. at 24).

In *DiFrancesco*, this Court considered whether a statutory provision that authorized the government to ask for a harsher sentence on appeal violated the protection against multiple punishments. The government there sought review, pursuant to the sentence-appeal provisions of 18 USC §3576, of the defendant's "dangerous offender" sentence, contending that it was too

lenient. This Court needed to decide what limits, if any, the Double Jeopardy Clause placed on government appeals of sentences.

This Court considered two discrete double jeopardy protections that might limit imposing an increased sentence following a government appeal. First, the Court rejected the argument that imposition of sentence effected the constitutional equivalent of an acquittal of all more severe sentences. 449 U.S. at 132-138. Citing its prior decisions in *Bozza v. United States*, 330 U.S. 160 (1947), and *North Carolina v. Pearce*, 395 U.S. 711 (1969), and the "basic design" of the Clause, this Court concluded that government appeals of sentences did not raise concerns such as the prosecution's being given repeated attempts to convict.

The Court then turned to the Double Jeopardy Clause's protection against multiple punishments. 449 U.S. at 138-143. While this Court found that the Double Jeopardy Clause did not forbid appellate review of sentences, *id.* at 136, it did not categorically exclude sentence enhancements from double jeopardy's protection against multiple punishments. Instead, the Court focused on the defendant's expectation of finality in the sentence under review. *Id.* at 136-37, 139.

DiFrancesco did not immediately accrue an expectation that the sentence imposed was final, this Court concluded, because USC §3576 provided the government with a right to seek review of that sentence which

must "be taken promptly," and the defendant was "charged with knowledge of the statute and its appeal provisions," *id.* at 136. An appellate increase does not constitute a multiple punishment, this Court concluded, because a defendant cannot have an expectation of finality at the point of commencement where Congress has specifically provided that the sentence is subject to appeal. *Id.* at 139. The defendant could have "no expectation of finality in this sentence until the appeal [was] concluded or the time to appeal ha[d] expired." *Id.* at 136.[11] The corollary to *DiFrancesco's* holding is that once the period during which a sentence is open to challenge expires, the defendant has a legitimately vested expectation that his sentence is final and cannot be enhanced. Stated as a double jeopardy principle, once a defendant accrues a legitimate expectation that his sentence is final, any subsequent increase or enhancement of that sentence effects forbidden multiple or successive punishment.

This Court has never called *DiFrancesco's* expectation-of-finality analysis into question. *See, Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985)(describing *DiFrancesco* as holding where "a federal statute allowed appellate review of the sentences ... the defendant could not claim any expectation of finality in his original sentencing," and remanding for

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[11]As set forth in footnotes 7,8 & 9, *ante*, the so-called "Majority" view cases cited by petitioner are consonant with this rule.

Pennsylvania court to determine whether state law allowed appeal of sentence); *see also, Jones v. Thomas*, 491 U.S. 376, 385-86 (1989)("the Double Jeopardy Clause protects not only against punishment in excess of legislative intent, but also against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality"); 491 U.S. at 393-95 (Scalia, J., dissenting).

There is virtually unanimous agreement among the federal courts addressing the issue that *DiFrancesco* tethered double jeopardy's application to sentencing increases to the defendant's legitimate expectation of finality. *See, e.g., United States v. Rosario*, 386 F.3d 166, 170-172 (2d Cir. 2004); *United States v. Silvers*, 90 F.3d 95, 99-100 (4th Cir. 1996)[12]; *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993); *United States v. Fogel*, 829 F.2d 77, 87 (D.C.Cir. 1987); *United States v. Arrellano-Rios*, 799 F.2d 520, 523-525 (9th Cir. 1986).

Petitioner is wrong that illegal sentences are exempt from *DiFrancesco's* legitimate-expectation-of-finality analysis. To the contrary, it is ordinarily the sentence's illegality that subjects it to an increase. In

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[12]In *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985), the Fourth Circuit, relying on *DiFrancesco*, rejected a double jeopardy challenge to a sentence increase effected on government motion 5 days after imposition of the original sentence. Since then, the Fourth Circuit has applied *DiFrancesco* to bar a sentence increase after the defendant had completed the originally imposed sentence. *See Silvers*, 90 F.3d at 101.

DiFrancesco itself, the sentence-appeal provisions of 18 USC §3576 allowed an increase on appeal "to correct only a legal error," 449 U.S. at 141, and foreclosed sentence increases under any other circumstances. *Id.* at 121.[13] The government sought to appeal DiFrancesco's sentence on the ground that the district court had abused its discretion in imposing an unlawfully low sentence. *Id.* at 125-26.

The New York Court of Appeals did no more than apply *DiFrancesco's* legitimate-expectation-of-finality analysis and fashion a rule that accommodates New York's unique sentence-correction landscape. It found that a New York defendant does not accrue a legitimate expectation of finality in an illegal sentence until after both the State's one-year period to challenge the sentence's legality has expired, and the defendant had been released from prison after serving the sentence. *Williams*, 14 N.Y.3d at 217.

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[13]A transcript of the *DiFrancesco* oral argument before this Court reveals that the Deputy Solicitor General conceded that the government had a right to challenge the sentence on appeal only because it was illegal. *See, e.g.*, "Now here we are talking about a case in which it's the Government's contention that there's something legally wrong with the sentence that was initially imposed and that the Government should be entitled to correct it," and "We're talking here only about the existence of a legal error. If there's no legal error, there is no change in the sentence and therefore no Double Jeopardy problem. So only the correction of erroneous sentences is what's at stake and we believe the Double Jeopardy Clause does not preclude that for the reasons given." Available online at http://www.oyez.org/cases/1980-1989/1980/1980_79_567/argument, last checked July 22, 2010.

Despite the obvious relevance of *DiFrancesco* to the instant matter and *Williams*' consistency with it, petitioner virtually ignores its legitimate-expectation-of-finality analysis, and instead foregrounds *Bozza v. United States*, 330 U.S. 160 (1947). In *Bozza*, this Court upheld the correction of an illegal sentence — the imposition of a mandatory fine — 5 hours after its imposition, *id.* at 166, leading petitioner to extrapolate that, "Likewise, amending respondents' sentences here to include their statutorily-mandated PRS terms did not put them twice in jeopardy for a single offense." Pet. at 22. *Williams* does not conflict with *Bozza*. *Bozza* did not hold, or purport to hold, that illegal sentences were forever subject to correction. The case established only the then-new principle that a sentence was subject to change after its commencement.

Nor did *DiFrancesco* distinguish *Bozza* as an illegal-sentence case and therefore different in kind. Instead, this Court invoked both *Bozza* and *North Carolina v. Pearce*, 395 U.S. 711 (1969), to illustrate that "a sentence does not have the same qualities of constitutional finality that attend an acquittal." *DiFrancesco*, 449 U.S. at 436-37. This Court did not use *Bozza* to exclude illegal sentences from the expectation-of-finality rubric. *Id.*

Bozza's concern with a defendant's unfairly capitalizing on a judge's mistake (330 U.S. at 166-67) has no application here, where respondents did

everything asked of them, including completing their prison sentences and even serving substantial portions of unlawfully imposed PRS.

Petitioner also relies on *Monge v. California*, in which this Court held that the Double Jeopardy Clause does not preclude retrial on a prior-conviction allegation in the non-capital sentencing context. 524 U.S. 721, 734 (1998). Petitioner points to a single sentence in *Monge* in which this Court stated, "[h]istorically, we have found double jeopardy protections inapplicable to sentencing proceedings . . . because the determinations at issue do not place a defendant in jeopardy for an 'offense,'" id. at 728, and concludes from this that the Double Jeopardy Clause's protections do not "even extend[] to noncapital sentencing proceedings." Pet. at 24.

But *Monge* did not purport to address whether an increase in a sentence can constitute a multiple punishment – the double jeopardy protection grounding *DiFrancesco's* legitimate-expectation-of-finality analysis. *Monge* concerned an entirely different aspect of double jeopardy, *i.e.*, whether retrial on a prior-conviction allegation amounted to a successive prosecution for the same offense. Just as *DiFrancesco* rejected the notion that a sentence once imposed is the constitutional equivalent of an acquittal of all more severe sentences, *Monge* held that, in the non-capital context, a sentencing proceeding that involves factfinding on a prior-conviction allegation and results in a sentence is not the constitutional equivalent of a

trial resulting in an acquittal. *Monge* did not address, and had no occasion to address, the rule flowing from *DiFrancesco* that an increase in a sentence after a defendant has accrued a legitimate expectation of finality constitutes a constitutionally prohibited multiple punishment.

Monge's discussion of *DiFrancesco* to show double jeopardy's limitations sets forth the two kinds of sentencing increases not barred by double jeopardy: "double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's' successful appeal." *Id.* at 730. The two examples cited by *Monge* do no more than restate the rules established by *DiFrancesco* and *Pearce*, are perfectly consistent with *Williams*, and do not support that double jeopardy protection against multiple punishments would permit a sentence increase after a defendant has accrued a legitimate expectation of finality upon the expiration of the time for government to appeal and after the sentence has been completed.

Petitioner, citing *Ex Parte Lange*, 85 U.S. 163 (1874), asserts that this Court has applied the double jeopardy guarantee against multiple punishments only once, and only when the defendant has fully suffered a lawful punishment for his crime. Pet. at 24. Petitioner concludes from this that the multiple punishment protection applies only where the punishment

imposed is not authorized by law, and stresses that PRS is statutorily authorized.

First, petitioner is factually wrong. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court found, among other things, that the failure to give defendant Rice credit for time previously served when he was convicted for the same offense after a retrial violated the Double Jeopardy Clause's multiple punishment protection. The second sentence violated the Double Jeopardy Clause's multiple punishment protection even though the withholding of credit was authorized by state law. *Id.* at 716-19. This Court has thus applied the multiple punishment protection to other than fully served lawful punishments. *Id.*[14]

Second, petitioner's conclusion that the multiple punishment protection applies only to sentences that exceed the punishment legislatively intended is also wrong. Not only does our previous citation to *North Carolina v. Pearce*, disprove this purported rule – because the punishment imposed on Rice was legislatively authorized, (*see id.* at 716) – but this Court has also emphasized that it is with respect to sentences imposed *in a single trial* that the Double Jeopardy Clause "does no more than prevent the sentencing court from

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[14]Rice had not fully served a lawful sentence. He was sentenced after a first trial to an aggregate prison term of 10 years. Two and one-half years later that first conviction was set aside on right-to-counsel grounds, defendant was retried and convicted, and sentenced to an aggregate 25-year sentence, with no credit for the two and one-half years already served.

prescribing greater punishment than the legislature intended." *See Missouri v. Hunter*, 459 U.S. 359, 366, 368 (1983); *Ohio v. Johnson*, 467 U.S. 493, 499 (1984).

In *United States v. Halper*, 490 U.S. 435 (1989), this Court held that double jeopardy barred the imposition of civil sanctions of more than $130,000 after the defendant had previously been sentenced to prison and a $5,000 fine in a criminal prosecution. Holding that the second sanction was punitive, not remedial, the Court found a violation of double jeopardy's prohibition against multiple punishments. *Id.* at 452. That the Government sought the civil penalty in a second proceeding was "critical" in triggering the protections of the Double Jeopardy Clause. *Id.* at 451, n. 10. Although in *Hudson v. United States*, 522 U.S. 93 (1997), this Court abrogated *Halper's* analysis for determining whether a civil sanction constitutes punishment, *Hudson* reaffirmed double jeopardy's protection against "the imposition of multiple *criminal* punishments for the same offense," when "such occurs in successive proceedings." *Id.* at 99 (emphasis in original). Here, PRS is indisputably a criminal punishment, and the resentencing occurred many years after the original sentencing and after the conclusion of all appeals. The imposition of PRS thus constituted an additional criminal punishment imposed at a successive proceeding — not, as the State would cast it, the simple addition of a legislatively authorized sentence. *DiFrancesco's*

legitimate expectation of finality test provides the proper analysis for determining double jeopardy's protections under the circumstances here.

Williams thus does not conflict with any of this Court's precedents. Consistent with *Bozza*, *Williams* confirms that an illegal sentence is subject to modification. Consistent with *DiFrancesco*, it confirms that the pertinent question concerns the defendant's legitimate expectations, and, under this standard, provides the State and the courts generous periods for seeking corrections. Again consistent with *DiFrancesco* (and a host of state and federal cases), it sets the time for appeal and completion of the sentence as the outer limits of any correction.

Accordingly, this Court's precedents provide no reason — let alone the requisite "compelling" reason — for certiorari to be granted.

III. These Cases Are Poor Vehicles for Considering the Double Jeopardy Clause's Application to Sentence Corrections to a Defendant's Detriment.

Even putting aside the artificial split petitioner has manufactured, *see* Point I, *ante*, and *Williams*' consistency with this Court's precedents, *see* Point II, *ante*, respondents' cases would be poor vehicles for considering double jeopardy's application to sentence increases effected after service of the sentence, because they present a scenario unlikely to recur, and involve only a small defined group of individuals.

The issue here arose from New York's idiosyncratic sentence-correction procedures, which provide the State with time-limited statutory remedies with respect to illegal sentences, *see* McKinney's New York Criminal Procedure Law §§460.10(1)(a), 440.40, while reposing in the courts an inherent — and until *Williams* — undefined power to correct unlawful sentences. *Williams*, 14 N.Y.3d at 212-13.

Until *Williams*, the New York Court of Appeals had never addressed the outside time limit within which a court may effect an increase to a sentence. *Id.* Recognizing that there must be a temporal limitation upon the power of a court to increase a sentence, *id.* at 212-13, 217, the court fixed a time limit within which New York's judicially created, and, until the decision below, largely inchoate, inherent sentence-correction power must be exercised, *i.e.*, not later than once the original sentence has been served and the direct appeal has been completed or the time to appeal has expired. *Id.* at 217.

New York's *sui generis* common law sentence-correctional landscape provides a poor vehicle for exploring the constitutional bounds of sentence correction generally. The particular issues presented in respondents' cases, hinging as they do on respondents' expectations at sentencing in light of the courts' then-undefined inherent powers, are unlikely to arise with any frequency. The issue would not, for example, arise in the Federal system.

which codifies sentence correction rules. *See*, Fed.R.Crim.Pro. 35(a) & fn. 3, *ante*.

Further, the number of individuals directly affected by *Williams* is finite – it is those sentenced New York defendants who did not have PRS originally imposed and who had been released from custody prior to having their sentences corrected at a resentencing.[15] Now that New York courts are on notice that they are required to pronounce a PRS term at sentencing, the issue of double jeopardy's application in such circumstances is not likely to recur even in New York.

* * *

In *DiFrancesco*, this Court was presented with a question of first impression and national importance, *i.e.*, whether the Double Jeopardy Clause of the Fifth Amendment allowed the government to appeal a sentence. *DiFrancesco* brought before the Court not only the first Federal statute that authorized the government to appeal a sentence (the Organized Crime Control Act of 1970), but the first government appeal of a sentence under its

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[15]Petitioner speculates that "the New York State Department of Correctional Services estimates that the PRS terms of as many as 30,000 criminal defendants might be affected" by the New York Court of Appeals' ruling. Pet. at 3-4. This number is materially overstated. Following *Williams*, the New York State Division of Parole identified approximately 1000 defendants that might be affected. *See* Declaration of Robert S. Dean, dated April 7, 2010, submitted to this Court under docket 09 A 839, in opposition to petitioner's application for a stay pending certiorari, at ¶11, and exhibits thereto. Petitioner has cited nothing that calls that number into doubt.

provisions.[15] Another provision, which later became 18 USC §3742, and gave the government the plenary right to appeal sentences, was then under consideration by Congress. PL 98-473, §213(a) (1984).

This Court answered that question with a rule of widespread application that has withstood the test of time: the multiple punishments protection of the Double Jeopardy Clause is not violated when an increased sentence is imposed upon a defendant following a government appeal, because the statutory appeal provisions prevent a defendant from accruing a legitimate expectation of finality in the original sentence. Here, the New York Court of Appeals logically applied that rule in a manner that honors the Double Jeopardy Clause's core protection against multiple punishments. Once the government's statutory time to appeal a sentence has expired, and a defendant has been released from incarceration following the completion of the prison sentence imposed by the Court, the addition of new punishment to the defendant's sentence for the same crime is a prohibited multiple punishment within the meaning of the Double Jeopardy Clause. Since every court to have applied *DiFrancesco*'s rule to similarly situated defendants has

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[15] *See*, transcript of *DiFrancesco* oral argument, available online at http://www.oyez.org/cases/1980-1989/1980/1980_79_567/argument, and last checked July 22, 2010

reached the same conclusion, there is no reason for this Court to revisit that rule now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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